87-1367

Supreme Court, U.S.
FILED
FEB 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN EMIL BOMHARDT,
Appellant

v.

STATE OF MARYLAND,
Appellee

On Appeal From the Court of Special Appeals of the State of Maryland

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1

Whether Article 81, Revenue and Taxes, of the Annotated Code of Maryland, as applied in this criminal case, is invalid because the terms, definitions and requirements of Article 81, and the forms provided thereunder, are vague, ambiguous and discriminatory, lacking explicit identification of appellant's class of transactions, and thus is unconstitutional and contrary to the due process and equal protection clauses of the 14th amendment to the U. S. Constitution?

2

Whether fundamental rights found in the 9th and 14th amendments to the U. S. Constitution were violated when a married technician was imprisoned for failure to file income tax forms, and continue to be violated, where the forms provided by the State Comptroller are vague, ambiguous and discriminatory, lacking specific provisions for master-servant transactions, and the commanded filing would impair the sustenance of the technician and his spouse by invading the technician's property rights in his labor?

3

Whether the terms, definitions and procedures adopted by the Court of Special Appeals of Maryland for this case should operate prospectively rather than retroactively?

NOTICE UNDER RULE 28.4 (b)

Resolution of the Constitutional issues in this case may affect Title 26 of the United States Code and, thus, 28 U.S.C. Section 2403 (a) may be applicable.

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JURISDICTIONAL STATEMENT

John Emil Bomhardt, the appellant, appeals from the mandate of the Court of Special Appeals of the State of Maryland, dated October 8, 1986 and the mandate of that Court dated July 13, 1987 resulting from further criminal proceedings affirming the judgments of the Circuit Court for Anne Arundel County, Maryland. The opinions and judgments find the Revenue and Taxation Acts of Maryland, Article 81, to be constitutionally valid and the resulting state action not violative of appellant's rights under the United States Constitution.

This Court has jurisdiction of this appeal. The federal questions were raised and decided below and are substantial issues important to the rights of the large class of citizens who receive wages for labor in the master-servant relationship.

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland dated September 8, 1986 resulting in a limited remand is unreported. It is reprinted in the appendix at page 36a.

The memorandum decision of the Circuit Court for Anne Arundel County, Maryland (Lerner, J.) is reprinted in the appendix at page 27a. This opinion and judgment entered on October 29, 1986 was the result of a remand hearing on a jurisdictional issue.

The opinion of the Court of Special Appeals of Maryland dated June 11, 1987 is reported at 71 Md. App. 609. It is reprinted in the appendix at page 13a. That appeal is from the remand jurisdictional hearing judgment and the ruling affirms the prior judgments.

JURISDICTION

This appeal is being docketed in this Court within 90 days from the denial on November 20, 1987 of a timely Petition for Writ of Certiorari to the Court of Appeals of Maryland, the State's highest court (No. 316, September Term, 1987).

This appeal is from the opinions and judgments of the Court of Special Appeals of Maryland which are now the judgment of the highest state court reviewing federal questions arising from appellant's criminal conviction. (No. 1453, September Term, 1985 mandate for limited remand issued October 8, 1986; No. 1509, September Term, 1986 mandate affirming prior judgments issued July 13, 1987).

A Notice of Appeal to this Court was timely filed on February 4th, 1988 in the Court of Special Appeals of Maryland.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (2). A prior appeal to this Court in this case, submitted prematurely, was dismissed for want of jurisdiction on April 27, 1987. (Appeal No. 86-1586, October Term, 1986).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, 9th, 14th and 16th amendments.
pertinent text in the appendix at page 1a.
United States Statutes, U.S.C. Title 26, Internal Revenue Code, Sections 6012 (a) and 61 (a).
Pertinent text in the appendix at page 1a.
Maryland Statutes, Article 81, Revenue and Taxes, sections 288, 294, 304, 310, and320.
pertinent text in the appendix at page 3a.

STATEMENT OF THE CASE

Facts from the trial record:

This case was initiated when the State arrested the appellant charging him with failure to file income tax forms under Article 81, Section 320, of the Maryland Annotated Code.

The appellant had been employed by the Westinghouse Corporation for over 29 years and at the time of his arrest he was a laboratory technician. The appellant and his wife had filed a Maryland income tax form for the year 1978 on April 12, 1979 and had received a refund of $62.99.

During 1981, Westinghouse paid him wages for his labor in the amount of $25,178.19. During 1982, he received wages in the amount of $28,093.91 and for the year 1983 he received wages in the amount of $29,543.91. This information is recorded on federal W-2 forms by a Westinghouse computer which has been programmed with hours worked, etc. The appellant maintained a rental property during this period from which he received rent in the amount of $2,435.27 for the year 1981, $2,775 for the year 1982 and $3,245 for the year 1983.

On January 4, 1982, the appellant filed a Maryland form MW 504, Maryland Employee Withholding Exemption Certificate as required by Westinghouse, answering questions provided thereon and thereby declared exemptions to the withholding of funds

from his wages by Westinghouse. A memorandom was attached to the certificate which explained his wages were an equal exchange for the labor he provided, along with an affidavit equating an equal exchange of the defendent's property (labor) for an equal exchange of the company's property (money). On June 21, 1984, the appellant was informed by the Office of the Comptroller that these MW 504 forms were now invalid and Westinghouse had been advised to begin withholding from his wages using one exemption. The appellant objected and threatened to institute legal action against Westinghouse to protect his rights.

On November 29, 1984, the Office of the Comptroller notified the appellant that they were unable to locate his returns for 1979 to 1983 and that it appeared that returns should have been filed. Forms were enclosed with a request to complete them and to submit them with (undetermined) taxes due.

The filing of a state income tax return is required if the total of all incomes (gross income) is $3000 for single status and $5400 for married filing jointly.

The appellant was arrested on May 6, 1985 on warrants charging he did fail to file tax returns for the years 1981, 1982, and 1983. The case was prosecuted on the 9th and 10th of October, 1985 before a jury in the Circuit Court for Anne Arundel County, Maryland by Assistant Attorney Generals of the State of Maryland on appointment by the governor to investigate and prosecute state income tax violations. The appellant was defended *pro. se.* The jury found him guilty on all counts. On November 22, 1985 Judge Eugene M. Lerner sentenced him to the maximum imprisonment of six months on each of three counts to be served consecutively and to a maximum fine totalling $1500.

The appellant was incarcerated immediately on November 22, 1985. He was released on bail pending appeal after a Habeas Corpus hearing on December 13, 1985. He was again incarcerated on January, 16 1987 after the remand hearing judgment and while an appeal was pending. He has been on parole since June 22, 1987.

How the federal questions were raised:

The instant case automatically has federal questions by its nature because the state statute incorporates portions of Title 26 of the United States Code. Additional federal questions raising constitutional issues were raised at the trial court level before, during, and after trial by the appellant in *pro se* proceedings, and by counsel in the appellate courts.

Before trial: The appellant filed a motion to show constraining need, or in the alternative to dismiss in the District Court for Anne Arundel County, Maryland. The motion asked the Court to have the State show the . . . lack of ambiguous, capricious, or arbitrary demands . . .necessary compliance of such a statute to have the force and effect of Law. . . that said statute applies to a natural sovereign individual and is not an abrogation of his inalienable rights guaranteed by the Constitution for the United States. . . and the Declaration of Independence. When the case was moved to the Circuit Court for Anne Arundel County, Maryland for a jury trial the motion was renewed.

At arraignment on July 22, 1985 the presiding judge directed the prosecution to set a hearing for all motions, but all pre-trial motions were summarily dismissed without a pre-trial hearing. The aforesaid motion was not answered by the State.

During Trial: The witnesses for the State testified on the definitions of terms and application of Title 26, U.S.C., Internal Revenue, sections 6012 (a) and 61 (a) to the instant case. The only witness called by the defense was the recall of a state witness to establish the fact that the state's officers were not using information from a federal income tax return when they testified.

After trial: Appellant filed a memorandum supporting a motion for a new trial challenging the validity of the state statute and state action as contrary to the due process and equal protection clauses of the U.S. Constitution as amended by the 14th Amendment and, inter alia,, that the forms provided do not have entry points to make the transition from the receipts to income in

the transaction of wages for labor. The State offered no rebuttal and the trial judge denied the motion.

On Appeal: The foregoing federal questions were argued in the Court of Special Appeals of Maryland relying on the U.S. Constitution as amended by the 9th and 14th Amendments. No other hearings have been held on the federal questions.

REASONS WHY THE QUESTIONS ARE SUBSTANTIAL AND PLENARY CONSIDERATION IS REQUIRED

This case involves a state income tax statute which has been accepted by the public for many years, but economic changes have undermined this public trust. The statute has become a burden on property rights in labor through the overbroard application of vague and ambiguous language to reach unlawfully beyond income to underlying wealth. Upon criminal prosecution under this statute, the appellant interposed a constitutional claim to lack of due process under the U.S. Constitution because of a lack of sufficient specificity to support criminal sanctions. On vague statutes: *Connally v. General Construction Co.*, 269 US 385 (1926).

The State's only answer to appellant's constitutional issues was a defense at the appellate level that the application and substance of the Maryland law is constitutional because the General Assembly (exercising limitless power) could have imposed a tax on the taxpayer's gross income without consideration of exemptions and deductions if it had seen fit to do so. This response does not take into consideration that the issue is not the assessment of a tax, but the use of criminal sanctions to force the performance of an act without specific authority to compel the appellant to do such act. It also does not take into consideration the self-imposed limitation on powers that the state chose in the state statute where it refers to portions of the income tax provisions of the federal internal revenue code for definitions of important words and phrases. There is no compelling state interest for such reliance.

The decisions of the lower courts in this case, without review by this Court, will result in continued application of this statute as a direct tax on persons and their labor although it is designated an income tax. Use of the same language in the same manner in federal cases would have the U.S. Congress laying an unconstitutional unapportioned direct capitation tax because the requirement of the 16th amendment to the U.S. Constitution to sever income from sources would not be met.

This controversy has not been resolved. There are conflicts among the lower courts, misapplication of precedent, continued infringement of fundamental rights, and other errors by the courts below.

Conflict among lower courts:

Since the term "Wages for Labor" cannot be found in the state statute or federal statute, the courts in the instant case have made an attempt to accommodate the government's position by finding a broad statutory net to capture all income of everyone everywhere. In doing so, they are not always careful to distinguish "income," "receipts," and sources generating income." Such a broad net must be structured to release the underlying wealth while capturing the intended classes of incomes. The structure of the forms supplied pursuant to the statute—a delegated legislative power—do not allow the potential taxpayer the right and facility to enter sufficient information to identify, segregate and tally accessions to underlying wealth.

The opinions of the Court of Special Appeals of Maryland in this case and opinions in the federal courts construing the same statutory provisions are inconsistent in two particulars:

1. The opinion by the court below and opinions of the federal courts differ in their approach to the resolution of the wages for labor issue. The Court of Special Appeals of Maryland held that none of the items of sources of income listed in I.R.C. Section 61 (a) include wages in exchange for labor. They put wages for labor

in the general class "other" relying on the phrase "income from whatever source derived." Some of the U.S. Circuit Courts of Appeal have held that wages are income and put wages for labor in the class "Compensation for Services (including fees, commissions and similar items)". e.g. *Granzow v. C.I.R.* 739 F.2d (7th Cir., 1984).

The differences in the above opinions create an insurmountable obstacle to the potential taxpayer's computation of taxes without his prejudicing his fundamental rights. The information given on returns in response to the federal and state statutes must correlate to satisfy other provisions of law. Furthermore, these decisions neglect the necessary constitutional requirement to sever income from underlying wealth. *See, 16th amend., U.S. Constitution; Md. Annotated Code,* Article 81, Section 297, "Copy of federal return may be required."

2. The opinion of the court below and opinions in the federal courts differ in the approach to the problem of alteration of income tax return forms by the potential taxpayer. The Court of Special Appeals of Maryland in the instant case held that the forms may be added in to any manner. The U.S. Circuit Courts of Appeals have held that an altered 1040 form does not constitute a return, e.g. *Beard v. C.I.R.* 793 F.2d 139 (6th Cir., 1986)

These opinions, state and federal, are discriminatory and contrary to the U.S. Constitution by prescribing and mandating forms which limit the entry points for information to be supplied by commanded filers, particularly those reached through overbroad application of vague language. Thus, for those in the master-servant relationship, the rights to deductions from receipts of wages for labor, such as the consideration given including expenses to maintain and deliver labor, are either arbitrarily precluded or interpreted as matters for legislative grace rather than fundamental right irrespective of legislative intent.

Misapplication of precedents:

The litigants and the courts are not always careful in the use of the words and phrases of the statutes and case precedent. Such terms as receipts, sources of income, return of capital, return of expenses, income, total income, gross income, adjusted gross income, and sources of payment can be more important in a wages for labor issue than in other litigation where that language is used but it is not in dispute by the litigants. This is particularly true in early income tax cases where the high personal exemptions precluded the presence of a litigant receiving wages for labor.

The only reference to case precedent by the State in answer to the appellant's constitutional defense is a group of Maryland cases in the appellee's brief to the Court of Special Appeals of Maryland. The cases cited are incorrectly applied because they are not adaptable to a wages for labor dispute. *Evans v. Comptroller of the Treasury, Income Tax Division,* 273 Md 172, 328 A.2d 272 (1974); *Marcos Associates, Inc. v. Comptroller of the Treasury,* 265 Md 669, 291 A.2d 489 (1972); *Comptroller v.Diebold,* 279 Md 401, 369 A.2d 77 (1977); *Katzenberg v. Comptroller of the Treasury,* 263 Md 189, 282 A.2d 465 (1971); *Leatherwood v. State* 49 Md. App. 683, 435 A.2d 477 (1981).

Leatherwood, *supra,* is the only criminal Article 81 case cited. The issues were application of the provisions pertaining to self-incrimination in the 5th Amendment to the U. S. Constitution and the question of the legality of the delegation of legislative authority to rely on the federal definition of income. Katzenberg, *supra,* was referred to in turn for the holding that the adoption of the federal definition does not constitute delegation of legislative authority.

Neither of these issues are in the instant case; delegation or not there are only federal statutory definitions as supported by case precedent available. "The Comptroller. . . He shall prescribe forms similar to those utilized by the federal government except to the extent required by the differences between this subtitle and

its application and the federal act and its application. He shall apply as far as practicable the administrative and judicial interpretations of the federal income tax law." *Md. Annotated Code,* Article 81, Section 304 (a).

Although the State has not offered precedents of this Court in the proceedings below, it is imperative to ultimately consider them in the resolution of the federal questions raised. The following cases (excepting Brushaber), which were cited on appeal by the appellant to fill this void, can be considered the leading cases defining some important words and phrases of the federal income tax: *Pollack v. Farmer Loan and Trust Co.,* 157 US 429 (1895), 158 US 601 (1895); *Knowlton v. Moore,* 178 US 41 (1900); *Brushaber v. Union Pacific Railroad Co.,* 240 US 1 (1916); *Southern Pacific Co. v. Lowe,* 247 US 334 (1917); *Einer v. Macomber,* 252 US 189 (1929); *Lucas v. Earl,* 281 US 111 (1930); *Commissioner v. Glenshaw Glass Co.,* 348.US 426 (1955); *James v. US,* 366 US 213 (1961). Although these cases also are not on point for the wages for labor issues they may be useful to develop a background theory from which the elaboration of definitions may be investigated; however, the cases do not reach beyond the managerial structure of business entities, into which profits have historically been passed, to the purchase of labor as a commodity resource.

Many law and ecomonic treatises have been unsuccessfully reviewed to find cited cases of this Court where the litigant contested the definition of profits as applied to basic wages (hourly or weekly) that the worker received for labor in the master-servant relationship. Such cases could, if they existed, answer the federal questions raised here.

An example of the problem in a treatise is the mistaken reference to the Pollock case, citation *supra,* as: "On the other hand, taxes on wages, professions, and trades were not considered direct taxes, and the tax on those sources of income would have been valid had not the entire tax amendment been ruled illegal in the second hearing because of the other unconstitutional provisions." *The Politics and Development of the Federal*

Income Tax, John F. Witte, The University of Wisconsin Press (1985) at Page 74 (The book is in this Court's library at KF6369.W69 1985.)

The litigant in Pollock was a stock holder raising issues pertaining to capital. The outcome could not be limited to these issues and to the litigant's narrow interests because as the court said, "If that be stricken out, and also the income from all invested personal property, bonds, stocks, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be borne by professions, trades, employment, or vocations; and in that way what was intended as a tax on capital would remain in substance a tax *on* occupations and labor... We do not mean to say . . . might not . . . lay *excise taxes* on business, *privileges,* employments, and vocations. But *this is not such an act;* and the scheme must be considered as a whole." (emphasis added), Pollock, 148 US 601.637.

The author of the treatise does not recognize that the litigant on the non-capital issues was not a proper party to dispute the other provisions making a problem for the court. However, it must be recognized that the court ruled—even if it is consider *dicta*—that the tax was *on* occupations and labor and thus a *direct tax.* The author also injects "wages" into the controversy where it is not found, and he fails to consider the distinction of a direct tax *imposed on income* an indirect tax imposed on *licenses and privileges* measured by income. Such errors are typical in income tax dissertations.

The omission of federal precedent, which the Comptroller of the State of Maryland must consider in the instant case, is equivalent to implicit misapplication by default just as the improper citing of the Maryland cases and *dicta* therein is explicit misapplication.

Infringement of fundamental rights:

For the appellant to comply with the command (or request) of the State to file prescribed income tax forms, there would be an inherent chill or restraint imposed on fundamental rights. These rights are expressed in the refrain "life, liberty and property" which is often debated and articulated as three independent concepts, but each of the trio can be shown to interact as facets of a larger unity—man and his labor are inseparable:

> "We hold from God the gift which includes all others. This gift is life—physical, intellectual and moral life.
>
> But life cannot maintain itself alone. The Creator of life has entrusted us with the responsibility of preserving, developing, and perfecting it. In order that we may accomplish this, He has put us in the midst of a variety of natural resources. By the application of our faculties to these natural resources we convert them into products, and use them. This process is necessary in order that life may run its appointed course.
>
> Life, faculties, production—in other words, individuality, liberty, property—this is man. And in spite of the cunning of artful political leaders, these three gifts from God precede all human legislation, and are superior to it.
>
> Life, liberty, and property do not exist because men have made laws. On the contrary, it was the fact that life, liberty, and property existed beforehand that caused men to make laws in the first place.
>
> Each of us has a natural right—from God—to defend his person, his liberty, and his property. These are the three basic requirements of life, and the preservation of any one of them is completely dependent upon the preservation of the other two. For what are our faculties but the extension of our individuality? And what is property but an extension of our faculties?" *The Law, Frederick Bastiat, 1850*(quoted from

> the Foundation for Economic Education edition of 1950 at page 5.)

While some political scientists, philosophers and practitioners of jurisprudence may object to the reference to a deity or natural law or natural rights, the substance of the above lengthy quote is generally accepted. An example of similar language from the courts is:

> "'Life' protected by the federal constitution includes all personal rights and their enjoyment embracing the use and enjoyment of the faculties, acquiring useful knowledge, right to marry, establish a home, and bring up children, freedom of worship, conscience, contract, occupation, speech, assembly, and press." *Rosenblum v. Rosenblum* 42 NYS2d 626, 630, (quoted from Black's Law Dictionary Rev. 4th Ed. at page 1074).

Article 81 infringes upon the quiet enjoyment of basic civil rights to provide the necessities and expenses for fulfilling the obligations incurred when a Maryland resident exercises the fundamental rights of marriage and procreation under the 9th amendment to the U.S. Constitution. On marriage: *Loving v. Virginia,* 388 US 1 (1967), On procreation: *Skinner v. Oklahoma,* 316 US 535 (1942).

Thus, the deprivation of the rights reaches beyond the incarceration and monetary penalties imposed on the appellant in the criminal prosecution to the derogation of the rights of the class of those receiving wages for labor in the master-servant relationship. It is a well known fact that even persons below the poverty line are treated as profit making entities by the taxing agencies in the application of the income tax codes as is evidenced by the following:

> "We believe that our federal and state tax systems should be evaluated continually in terms of their impact on the poor. We also believe that the families below the official poverty line should not be required to pay income taxes. Such families, by definition, are without sufficient resources to

purchase the basic necessities of life." *A MARYLAND RESPONSE to the Pastoral Letter on Catholic Social Teaching and the U.S. Economy* by the Maryland Catholic Conference, Baltimore, Maryland, January 1988 at Page 12.

The report goes on to state that recent changes in the state tax laws have not removed all Marylanders below the poverty line from the tax rolls. Such people are usually in the master-servant class.

This Court must consider the constitutional dimensions of the fact that statutory personal exemptions had the effect of excluding the class of workers in the master-servant relationship as a matter of law, but that the value of these exemptions has been eroded by inflation so that the original intent of the legislature, whatever it might have been, may no longer exist.

The statute has become a direct tax on the person or the person's labor. It seems to be a capitation tax as used in Article I, Section 9 of the U.S. Constitution. A contrary opinion concerning categories of tax law proclaims that capitation taxes may have classifications but that they cannot have provisions correcting for levels of "income". *FEDERAL INCOME TAXATION OF INDIVIDUALS And Basic Concepts in the Taxation of All Entities,* at page 12, Daniel Q. Posin, West Publishing Co. 1983.

The category of a tax is determined not only by the words imposing the tax in the statute but also by what is done in enforcement. Our forefathers gave great powers of taxation to the governments, but they were not arbitrary powers; there are different rules for different categories. Taxes are imposed either on property, use, person, privilege, event or transaction.

Katzenberg, *supra,* holds that an income tax is not a property tax. The Court of Appeals of Maryland has also held that the Maryland income tax is on the resident and privilege of residency with income the measure of the tax. See *Fax, et ux v. State Tax Commission of Maryland* 212 Md 296 (1957). That Court has also held that taxes imposed on subjects other than income, e.g.

franchises, privileges, etc., are not income taxes, although measured on the basis of income. See *Gardella et ux v. Comptroller of the State of Maryland et al* 213 Md 1 (1957). Article 81 states, "There is hereby levied and imposed for each calendar year . . . a tax on the net taxable income. . . of every resident individual of this State. . . "Md. *Annotated Code,* Article 81, Section 288.

From the foregoing, it is clear that the appellant's fundamental rights in his labor have been violated by the ambiguities in the object, wording and application of Article 81.

Retrospective and other matters:

Retrospective:

The rule adopted by the Maryland courts in this case to allow additions in any manner to the forms provided by the Comptroller should be applied prospectively because it was not the law at the time the crimes were committed. The applicable law is from section 294 (a) "... shall file with the Comptroller a return in such form as the Comptroller shall prescribe. . . " and from section 310(b) "Any claim for a refund made under and pursuant hereto shall be in such form, verified in such manner, contain such information, and be supported by such documents as may be prescribed by regulations of the Comptroller. . . "

Other matters:

The prosecutors in this case came prepared to convict a "protester" but found a methodical, persistent worker defending his property rights in labor from confiscation. The presiding judge gave the jury the prosecutor's requested instruction, "It is not a defense that the wilfull failure to furnish tax information required by law was done for the purpose of protesting government policies, even if such protest is with good motive." However, no testimony or evidence was offered or admitted into the trial involving the issue of protest.

The insinuation continues to plague the appellant and could be factor in falsely influencing the revire by any Court. It may have affected the Maryland courts in their contemplation of the facts.

The Court of Special Appeals of Maryland in its opinion at page 36a, in the appendix, misinterpreted the appellant's entries on the Employee's Maryland Exemption Certificate in regard to withholding of funds from wages as a broader claim to exemption from the tax law. They then concluded that the appellant should have applied for a statutory exemption. The problem presented is not one of a special exemption under the statute for the appellant, but lack of specific legislative intent to reach those in the master-servant relationship. The inability, using the forms provided, to identify, segregate and tally any accession to wealth from wages for labor, where in fact there are no accretions, arises from this lack of legislative intent.

CONCLUSIONS

For the foregoing reasons, the appellant urges this Court to note probable jurisdiction and to schedule this case for plenary consideration.

Respectfully Submitted,

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